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IN THE

Supreme Court of the United States

October Term, 1953.

No. 538

THEODORE W. KELLER and DOROTHY L. KELLER, co-partners trading under the name of Howard Manufacturing Company, *Petitioners*,

vs.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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CHARLES E. SWANSON,
Counsel for Petitioners.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

The petitioners, Theodore W. Keller and Dorothy L. Keller, respectfully pray that a writ of certiorari issue to review the judgment entered in this case on October 1, 1953, by the United States Court of Appeals for the District of Columbia Circuit, dismissing a petition to review the Tax Court's redetermination under the Renegotiation Act of 1943 of petitioners' alleged excessive profits.

JURISDICTION

The judgment of the Court of Appeals was entered on October 1, 1953 (R. 69). A petition for rehearing was timely filed on October 15, 1953 (R. 71-82), and was denied on December 1, 1953 (R. 89).

The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

OPINIONS BELOW

The opinion of the Tax Court in the renegotiation matter involved in this case was a memorandum opinion, not officially reported (15 T. C. 1010, Docket 317-R). The portions pertaining to the present proceeding have been made part of the record herein. (R. 46-57)

The opinion of the United States Court of Appeals for the District of Columbia Circuit, dismissing petitioners' request for review of the Tax Court decision, has been reported at 207 F. 2d 610 (advance sheets), and is made a part of the record (R. 68).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent provisions of the Constitution of the United States and of the statutes involved are set forth in the Appendix, *infra*, pp. 24-27.

SUMMARY STATEMENT OF THE MATTER INVOLVED

This case involves a purported renegotiation of alleged excessive profits realized by petitioners from their contracts with Government agencies during the calendar year 1943, under the Renegotiation Act of 1943, being Section 403 of the 6th Supplemental National Defense Appropriation Act of 1942, as amended from time to time, and as amended in full by Section 701(b) of the Revenue Act of 1943, 58 Stat. 21, 78-93.

The renegotiation proceeding was conducted by the War Contracts Price Adjustment Board. That Board was created by the provisions of Section 701(b), *supra*, enacted

February 25, 1944. Under the provisions of the Act creating the Board, the actions of the Board were to be effective only with respect to fiscal years *ending after June 30, 1943.*

The petitioners, husband and wife, trading as co-partners under the name of Howard Manufacturing Company, at Council Bluffs, Iowa, realized profits during their calendar (fiscal) years 1942 and 1943 from certain contracts with United States Government agencies performed during those years.

Petitioners' profits for the calendar year *1942* were renegotiated by the War *Department* Price Adjustment Board under the provisions of the Renegotiation Act for 1942 by means of a bilateral agreement with the Under-Secretary of War, by which agreement it was determined that $60,000 of petitioners' profits for the calendar year 1942 were excessive and should be eliminated. (R. 35)

Later, because of adjustments made by the Internal Revenue Service of the Treasury Department, petitioners' income for the calendar year *1942* was increased in the amount of approximately $121,000. (R. 32-35)

On May 10, 1945, the War *Department* Price Adjustment Board, because of the adjustment made by the Internal Revenue Service in petitioners' net income for 1942, increased the finding of the amount of excessive profits for the year 1942 from $60,000 to $180,000—an increase of $120,000. (R. 38-41) The petitioners were allowed as a credit against the unilateral determination of $180,000 the amounts which they had paid under the $60,000 bilateral agreement.

On the same day (May 10, 1945), the War *Contracts* Price Adjustment Board made a unilateral order determining that "for the year ended December 31, *1943*" petitioners had realized excessive profits of $1,149,275.00 "exclusive of the amounts referred to in the next paragraph" of the order. (R. 23)

The "next paragraph" of the order made by the War Contracts Price Adjustment Board read as follows: (R. 23)

"As a result of such renegotiation, it is hereby further determined that *in addition* to the amounts referred to in the preceding paragraph, $120,000 represents an additional portion of the contractor's profits derived from contracts with the departments and subcontracts which is excessive within the meaning of the Renegotiation Act and which should be eliminated under this order, except that no part of such sum of $120,000 shall be eliminated hereunder which is or shall be repaid by cash, tax credit, or otherwise pursuant to the determination dated 10 May 1945 issued by me with respect to the fiscal year of the contractor ended 31 December *1942*. (In making this computation, payments by the contractor to the Treasurer of the United States pursuant to the Renegotiation Agreement dated 31 December 1943 referred to in such determination shall not be considered payments pursuant to such determination.)" (Emphasis supplied)

Petitioners' fiscal year 1942 was the calendar year 1942 and ended on December 31, 1942. Their fiscal year 1943 was the calendar year 1943 and ended on December 31, 1943.

Within the time allowed by applicable laws, petitioners appealed the *1943* determination of excessive profits by the War *Contracts* Price Adjustment Board to the Tax Court of the United States.

In their petition to the Tax Court (R. 13-19), petitioners contended that:

1. The Board's order was void and had no legal force or effect because the Board's determination was not made in conformity with the provisions of the Renegotiation Act.

2. The Board's order was void because the determination was arbitrary, ambiguous, doubtful, uncertain in terms, and excessive.

3. The Act as applied by the Board is unconstitutional, because it amounts to the taking of petitioners' property without due process of law, in violation of the Fifth Amendment and of Article I, Section 1.

Among other prayers to the Tax Court, petitioners asked it to find that the Board's determination ostensibly for 1943, was *void.*

During the trial and subsequent proceedings in the Tax Court the petitioners contended that both the Board and Court lacked jurisdiction with respect to excessive profits for the year *1942.* (R. 31, 62-66).

It was also contended in the Tax Court that the order appealed from had no legal force or effect because it showed on its face, viewed in the light of the surrounding facts and circumstances, that the Board unlawfully had given consideration to profits of the petitioners received or accrued in a fiscal year ending *prior* to June 30, 1943—the Board having no authority to consider, determine, or eliminate profits in fiscal years ending before that date.

Prior to decision by the Tax Court, the United States Government filed two suits against petitioners in the District Court for Iowa on the determinations for *1942 and 1943,* which are pending. (R 62-66). One suit, filed June 13, 1949, asked judgment against the petitioners for $203,-081.15, being the sum of $1,149,275 for 1943 plus the "additional" amount of $120,000, or a total of $1,269,275, less applicable tax credits of $1,066,193.85.

The Tax Court (by one Judge thereof) in an opinion of December 27, 1950 (R. 46-56), rejected petitioners' prayer that the Board's order be declared void.

The findings and opinion held:

(1) That the Board's order for 1943 was one for that year; (2) that it did not renegotiate or determine excessive profits, or provide for elimination or collection of excessive profits, for *1942;* (3) that it is not ambiguous, doubtful, or uncertain, and, accordingly, is not void in whole or in part; (4) further, that if it is void as to the additional amount of $120,000, it is not void as to the other amount. (R. 46-56)

The Tax Court decision (R. 57) made a redetermination that petitioners' excessive profits for the fiscal year ended December 31, 1943, were $1,100,000.

Petitioners duly petitioned the United States Court of Appeals for the District of Columbia Circuit (R. 1-12) to review the Tax Court decision, under authority of 26 U. S. C. 1141-1142, *infra*, pp. 26-27.

Petitioners contended in the Court of Appeals that the Board's order for 1943 being void, it conferred no jurisdiction upon the Tax Court to determine petitioners' excessive profits; and that the Tax Court had jurisdiction to consider the question as to the validity of the order, but had no jurisdiction to alter, amend, implement, delete, or modify the Board order.

Petitioners also contended, in the Court of Appeals, that they were deprived of their constitutional rights to due process of law, under the procedures applied in the taking of their property by the so-called renegotiation.

A division of the Court of Appeals, composed of three Judges thereof, heard arguments on the case by petitioners and the government (as respondent), on April 21, 1953.

On October 1, 1953, *two weeks after a member of the Appeals Court division had died,* a decision *"Per Curiam"* was filed, dismissing the petition to review the decision of the Tax Court.

The original *Per Curiam* opinion does not bear the signature or initials of any Judge. The original of the judgment bears the initials only of the Presiding Judge of the division.

Petitioners are informed that no minutes exist showing the dates and places of approval or concurrence in the opinion and judgment by the several Judges of the division. But appended to the *Per Curiam* opinion is the statement: "Circuit Judge Proctor concurred in this opinion but died before it was filed."

The body of the opinion (omitting caption and names of counsel) consists of the following: (R. 68)

> "PER CURIAM. The petition to review the Tax Court's determination of petitioners' excessive profits

is dismissed. *Psaty & Fuhrman, Inc.* v. *Stimson*, 87 U. S. App. D. C. 47, 182 F. 2d 985, and cases cited.
Dismissed."

Petitioners in this Court contend that the decisions of the Tax Court and of the United States Court of Appeals for the District of Columbia Circuit, and the *procedures* which led up to them—through the War Contracts Price Adjustment Board, the Tax Court, and the Court of Appeals—*involved flagrant and prejudicial violations of the laws enacted by Congress and of the Constitution of the United States.*

QUESTIONS PRESENTED

1. Whether the Tax Court—*contrary to its own decision in a later case*—has jurisdiction and authority to make a redetermination of excessive profits under the Renegotiation Act of 1943, when the statutory requirement for a *prior* determination by an administrative Board has not been fulfilled because such Board in effect evaded and disregarded jurisdictional limitations and issued an order that was, on its face, void *ab initio* because it exceeded the Board's statutory authority.

2. Whether a proper *review* of a redetermination by the Tax Court of excessive profits may be denied by a decision of the United States Court of Appeals for the District of Columbia *which fails to answer the questions presented to it as to:*

(a) The lack of jurisdiction of the Tax Court;

(b) Prejudicial errors of the Tax Court through lack of recognition of mistakes of law and fact; and

(c) The unconstitutionality of specific procedural provisions of the Renegotiation Act and of certain administrative action taken.

3. Whether the *procedural provisions* of the Renegotiation Act of 1943, as amended, in failing to provide adequate and effective *appeal* to the United States Courts from *administrative agencies* (*including the Tax Court*), are invalid and unconstitutional, and in particular violation of the due-process-of-law clause of the Fifth Amendment, the Supreme Court having heretofore reserved decision, in at least two cases, as to such procedures and as to the *finality* of Tax Court redeterminations of excessive profits.

4. Whether there can be a valid decision of a division of a Court of Appeals—in view of the statutory requirement of 28 U. S. C. 46(b) for divisions "each consisting of three Judges"—when one of the Judges died two weeks before a decision "Per Curiam" was filed which bore the notation he had concurred in the opinion, but the original opinion lacked the name or initials of any Judge and the original of the judgment had only the initials of the division's presiding Judge.

REASONS FOR GRANTING THE WRIT

This case involves questions of substance relating to:

1. The construction or application of the Constitution and statutes of the United States, which have not been, but should be, settled by this Court;

2. A decision of the United States Court of Appeals for the District of Columbia Circuit wherein that Court has failed to give proper effect to applicable decisions of this Court;

3. An improper and erroneous decision by that Court on a question of general importance, relating to the renegotiation of excessive profits.

4. An important question as to the composition and power of the United States Court of Appeals for the District of Columbia Circuit, as well as the Circuit Courts of Appeals generally.

Among the reasons for granting the writ are the following:

POINT I

Petitioners, who are citizens of the United States, have been deprived of their constitutional rights by the taking of their property without due process of law, through so-called renegotiation of excessive profits, under the following circumstances:

(a) An initial administrative determination of excessive profits that was wholly void because the Board which made it included profits for a year over which it had no authority, and then sought to conceal the illegality of its order by misleading language.

(b) The Tax Court then made a so-called redetermination although there had been no valid initial determination, *and the Tax Court, itself, stated in a later case that it lacked jurisdiction under such circumstances, infra,* p. 16.

(c) The United States Court of Appeals for the District of Columbia Circuit refused a proper review of the Tax Court decision, although the lower Court previously, in *other* cases involving renegotiation, had acknowledged its duty and power to review where questions of jurisdiction or constitutionality were involved—and such questions were raised by petitioners in this case.

(d) The Act involved, as construed and applied by the lower Court and the Tax Court, has resulted in a denial to petitioners of a proper and just appeal to and review by the federal courts of general jurisdiction. Therefore, relief has been denied from an illegal and prejudicial administrative order taking petitioners' property.

Errors of Fact and Law

The lack of a proper Court review has permitted serious prejudicial errors to go uncorrected.

The *first* in a series of prejudicial errors occurred when the War Contracts Price Adjustment Board engrafted upon its determination of petitioners' excessive profits for the

year ending December 31, *1943*, an "additional" amount of $120,000 as excessive profits against which could be credited payments made pursuant to a prior determination by another Board for the previous year ending December 31, *1942*.

In other words, the War Contracts Price Adjustment Board plainly exceeded its jurisdiction, which was limited to determinations for fiscal years ending after June 30, 1943, under the Renegotiation Act of 1943, *supra*.

The Board had no right whatever to intermingle with a determination for 1943 an additional finding that was, in effect, an order intended to *enforce collection of part of the profits for 1942*. This unauthorized action of the Board made its order void and of no effect.

The Board's action was a clear usurpation of authority, such as has been condemned by this Court.

In *Waite* v. *Macy*, 246 U. S. 606, l.c. 607 (38 S. Ct. 395, 396), Mr. Justice Holmes stated in the following language the principle fixing the limits of administrative action:

> "No doubt it is true that this Court cannot displace the judgment of the Board in any matter within its jurisdiction (the Board being an administrative agency), but it is equally true that the Board cannot enlarge the powers given to it by statute and cover a usurpation by calling it a decision on purity, quality, or fitness for consumption."

Likewise, in *Joint Anti-Fascist Refugee Committee* v. *McGrath* (341 U. S. 123, l. c. 136-137, 71 S. Ct. 624, l. c. 631) this Court said:

> "Where an act of an official plainly falls outside of the scope of his authority, he does not make that act legal by doing it and then invoking the doctrine of administrative construction to cover it. • • •
>
> "Since we find that the conduct ascribed to the Attorney General by the complaints is patently arbitrary, the deference ordinarily due administrative construction of an administrative order is not sufficient to bring his alleged conduct within the authority conferred by Executive Order No. 9835. *The doctrine of administra-*

tive construction never has been carried so far as to permit administrative discretion to run riot * * *".* (Emphasis supplied)

And in *Stark* v. *Wickard*, 321 U. S. 288, l. c. 307, 310, this Court stated:

"When Congress passes an act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted.

"* * * under Article III, Congress established *courts* to adjudicate cases and controversies as to claims of infringement of individual rights whether by unlawful action of private persons *or by the exertion of unauthorized administrative power.*" (Emphasis supplied)

See also: *U. S.* v. *Morgan*, 307 U. S. 183, l.c. 190-191; *Morgan* v. *U. S.*, 298 U. S. 468, 479; *Brannan* v. *Stark*, 342 U. S. 451; *Board of Governors* v. *Agnew*, 329 U. S. 441.

In the present case, the Board's order represented an arbitrary abuse and usurpation of power by an administrative body, in excess of statutory authority.

It was illegal, invalid, and void, and should have been treated as a *nullity* by the Tax Court, *in accordance with a principle which it recognized in a later case, infra*, p. 16.

However, petitioners had no recourse but to file a petition with the Tax Court for a redetermination, because of the provisions of the Renegotiation statute, *supra*, and the decisions of this Court in *Lichter* v. *U. S.*, 334 U. S. 742, and *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U. S. 752.

In following such prescribed procedure, petitioners asserted in the Tax Court that the Board's determination was invalid and void, because not made in conformity with the Act.

The question of *constitutionality* of the Act also was raised, although as an administrative agency the Tax Court lacked authority to actually decide that question.

Petitioners requested the Tax Court to determine that the Board's order was void, and beyond the *jurisdiction* of the Board AND Tax Court. (R. 13-19 and R. 50)

The *second* important error occurred when the Tax Court (in an unreviewed decision by one Judge thereof) rejected petitioners' contentions and held: (R. 55-56)

> "We conclude and hold that the order was one in its entirety for 1943; that it did not renegotiate or determine excessive profits, or provide for elimination or collection of excessive profits, for the year 1942 * * * and is not void in whole or in part."

The *third* error was the Tax Court's acceptance, as proper, of the inclusion in the Board's order of the $120,000 item—on the ground, apparently, that it represented a necessary accounting adjustment. (R. 53)

This is directly contrary to the facts of record, which show that the accounting adjustments had been made by the Internal Revenue Service on July 12, 1944 (R. 32-35), approximately ten months before the War *Department* Price Adjustment Board accordingly made a supplemental determination for the year *1942* (R. 38-41). Therefore, when the War *Contracts* Price Adjustment Board on the same date made a determination of excessive profits for the year *1943* (R. 20-24), it, in fact, by its "additional" finding, *duplicated* an amount of $120,000 for 1942.

Lower Court Ignored Errors

The *fourth* important error occurred when the Court of Appeals failed to recognize and pass on questions of jurisdiction of the Tax Court, and the constitutionality of the procedural provisions of the Renegotiation Act, which petitioners had raised.

In effect, the Court below ignored those questions, by not discussing or answering them.

This failure of the Court below does not conform with what was said by Justice Frankfurter in his concurring

opinion in *Western Pac. RR.* v. *Western Pac. Ry.*, 345 U. S. 247:

> "Presumably, however, an opinion states the issues and gives the grounds for its conclusions, and thereby sufficiently alerts the minds of experienced Judges to what is at stake."

Likewise, in *14 American Jurisprudence*, p. 348, Sec. 132, it is stated:

> "* * * It has been held that where a question is important and the amount involved is large, the Judges of the Court of first instance should give the reason on which they rest their decision." (Cases cited in footnote 19)

(The Tax Court is an administrative body, and not a United States Court.)

The principle of "reasoned opinions" has been recognized in other cases.[1]

The lower Court's decision was on authority of *Psaty & Fuhrman, Inc.* v. *Stimson*, 182 F. 2d 985 (and cases there cited).

But an examination of the record and briefs in the *Psaty* case shows:

1. In *that* case, no question was raised as to the *jurisdiction* of the Tax Court, nor of the Board below.

2. The petitioner in the *Psaty* case made no contention that the original determination (by the Secretary of War), which was taken to the Tax Court, was void or illegal. (See 11 T. C. 640, 643). *Such contention is made in the present case.*

3. The petitioner in the *Psaty* case stipulated that the question of constitutionality, i.e., whether the Renegotiation Act could be retroactively applied, would be left to

[1] *B. & O. RR.* v. *U. S.*, 279 U. S. 781 (l.c. 787); *Ark. Comm.* v. *Chicago etc. RR.*, 274 U. S. 597, 603; *Cincin. RR.* v. *McKeen*, 149 U. S. 259, 260.

determination by decisions in certain other cases then pending.

That issue is NOT involved in the present case; and, further, petitioners have NOT waived the questions of procedural due process raised in the Tax Court and in the Court of Appeals.

In short, the questions involved in the present case were NOT involved in the *Psaty* case.

The sum and substance of the *Psaty* case is that the Tax Court was asked to apply to a redetermination of the firm's excess profits a statute enacted after the date of the initial determination by the Secretary of War.

Nothing of that kind is involved in the present case.

Petitioners herein have raised important questions as to the *jurisdiction* of the administrative Board *and* the Tax Court, and as to the *constitutionality* of the procedural provisions of the Renegotiation Act of 1943.

These questions have not been answered by the lower Court. In effect, petitioners have been denied a judicial review.

While it has been held that a right to appeal is not necessary for due process, where a United States Court has tried a case, petitioners contend that this is not true where the determinations of an *administrative agency* are in question.

It was held in *Bridges* v. *Wixon*, 144 F. (2) 927, that the right of the Courts to consider whether due process of law has been observed is derived directly from the Constitution:

> "The Courts have uniformly held that Congress cannot authorize a deprivation of liberty without due process of law, as provided in the Constitution, by the device of making the fact findings of an administrative board conclusive on the Courts." (Reversed on other grounds, 326 U. S. 135).

In upholding statutes providing for administrative determinations, this Court has pointed out in several decisions

that such statutes provide specifically for appeals to or review by the federal Courts. (*Labor Board* v. *Jones & Laughlin*, 301 U. S. 1, l. c. 1, 47; *Yakus* v. *U. S.*, 321 U. S. l. c. 428, 429.)

The lower Court's decision in this case is, in effect, a reversal of its own decision in *U. S. Elec. Motors* v. *Jones*, 80 U. S. App. D. C. 329 (1946), in which it was stated (l.c. 331-332):

> "We think, therefore, that the statute places exclusive and unreviewable jurisdiction in the Tax Court to determine the amount of excessive profits, including questions of both law and fact in such determinations, *but that a ruling upon the jurisdiction of the Tax Court is untouched by that provision, and therefore remains reviewable by this Court. It would, we think, require clear language to indicate that Congress intended that any tribunal should have unreviewable authority to determine its own jurisdiction.*" (Emphasis supplied)

The jurisdiction of the Courts of Appeals to review Tax Court decisions in renegotiation cases was further asserted by the decision in *Blanchard Mach. Co.* v. *R. F. C.*, 85 U. S. App. D. C. 361, 362, certiorari denied 339 U. S. 912. See also *Armstrong* v. *War Contracts Board*, 194 F. 2d 875.

Conflict of Decisions

There is, however, a conflict of decisions between the Court of Appeals for the District of Columbia, and the Court of Appeals for the Ninth Circuit. The latter held in *French* v. *War Contracts Price Adjustment Board*, 182 F. (2) 560, that there can be no appeal from or review of Tax Court renegotiation determinations.

There is also a conflict of decisions of the Tax Court, on the question of its jurisdiction in profits-renegotiation cases. The decision of the Court of Appeals of the District of Columbia does nothing to resolve it.

Such a decision is not a guide to other litigants, the public, the lower courts, or to administrative agencies.

The Tax Court's erroneous decision in the present case is in conflict with its correct decision in a *later* case, *National Builders* v. *Secretary of War*, 16 T. C. 1221, 1227, wherein it was said:

> "The statutory basis of this Court's jurisdiction under the Renegotiation Act is a *valid* determination of excessive profits, made by an agent or agency of the government which has the authority under the Renegotiation Act to make the determination. It is from a *valid* determination under the Renegotiation Act that a petition to this Court may be filed. Sec. 403(e). If, and only if this Court has *jurisdiction*, may we exercise the function of making a *redetermination* with respect to excessive profits * * *.
>
> "The petitioners contend, mistakenly, that we can take jurisdiction from an *invalid* determination of excessive profits, i.e., one made without statutory authority, and *de novo* make a valid determination of excessive profits, if any are found to exist. *The Congress has not placed such authority in this Court. Accordingly, we must dismiss this proceeding for lack of jurisdiction.*"

See also *Maguire Industries* v. *Secretary of War*, 12 T. C. 75, as to lack of Tax Court authority to correct a defect in an order determining excessive profits.

The Court of Appeals decision virtually ignores the rule laid down by THIS Court in Lichter v. U. S., supra.

There, in passing upon certain questions of constitutionality raised against the Renegotiation Act, this Court said:

> "In procedure which affects property rights as directly and substantially as that authorized by the Renegotiation Act, the governmental action authorized, although rested on valid constitutional grounds, is capable of gross abuse. * * * We reemphasize that, under these conditions, *there is great need both for adequate channels of procedural due process and for*

careful conformity to those channels. (Emphasis supplied)

This Court was there considering an "emergency" legislative enactment which, by its terms, vests exclusive *final* authority in an *administrative* body, the Tax Court,[1] to determine the amount of excessive profits—without any definite standard by which to measure them; and which further provides that "such determination shall not be reviewed or redetermined by any Court or agency."

But this Court has not fully and finally sustained the validity of that wartime attempt by Congress to erect an iron curtain between citizens who are levied upon and the federal Courts that are established, in part at least, to protect their life, liberty, and property under constitutional safeguards.

Instead, *this Court restricted its approval of the Act,* by stating in the *Lichter* case, supra, (l.c. 753):

> "We have two main issues before us: (1) The constitutionality of the Renegotiation Act on its face, and (2) the *finality* of the determination of the excessive profits made under it in the absence of a petition filed with the Tax Court within the required time, seeking a redetermination of those profits. * * *
>
> (l.c. 791) "No petitions were filed with the Tax Court in any of the cases before us, and the time for doing so has expired. Accordingly, here, as in *Aircraft and Diesel Corp* v. *Hirsch,* 331 U. S. 752, 771, *we do not have before us, and we do not express an opinion upon, the finality which would have attached to a redetermination by the Tax Court if such a redetermination had been sought and made.* We have only the situations presented by the respective failures of the petitioners to resort to the Tax Court in the face of the express statutory provision made for such administrative relief. * * *
>
> "Failure of the respective petitioners to exhaust that procedure has left them with no right to press

[1]See *Old Colony Trust Co.* v. *C.I.R.,* 49 S. Ct. 499 (279 U. S. 716), and *Tracy* v. *C.I.R.,* 53 F. 2d 575, 53 S. Ct. 83.

here issues such as those as to coverage and the amount of profits which might have been presented there." (Emphasis supplied)

The rightful unwillingness of this Court to give blanket approval to the vague and harsh provisions of the Renegotiation Act of 1943 was evidenced in the *Aircraft & Diesel* case, *supra*, where this Court said: (l.c. 771):

> "We do not express any opinion, *indeed we explicitly reserve decision, upon the question of the finality of Tax Court decisions in these matters.* * * * We are not forced in this case, however, to decide whether Congress intended to give the Tax Court the last word upon all questions of fact and law, *or whether it could do so if that were surely its purpose* * * * For it seems obvious * * * that Congress clearly and at the very least intended the Tax Court's functions not only to be put in motion but to be fully performed, before judicial intervention could take place at the instance of one in appellant's position." (Emphasis supplied)

The danger of "gross abuse" in the administration of the Act, *which this Court foresaw*, has materialized in the present case to such an extent that petitioners' constitutional rights have been flagrantly violated.

In *Holden* v. *Hardy*, 169 U. S. 366, 390, the Court held, on the question of the meaning of "due process of law":

> "It is certain that these words imply a conformity with natural and inherent principles of justice."

Petitioners submit that they have been denied the protection of the Constitution and laws of the United States in proceedings that include:

1. An initial *void* determination by a hybrid, quasi-military-administrative Board that evaded and violated the law;

2. A later "redetermination" by the Tax Court despite the lack of a valid prior determination necessary for jurisdiction of either the Board or the Tax Court;

3. A prejudicial failure of the Tax Court to recognize the illegality and invalidity of an item of $120,000 in the Board's order;

4. "Strong-arm" authority in the law for the government to sue in the United States District Courts for alleged excessive profits prior to a *final* determination;

(The petitioners herein have been so sued in the U. S. District Court for Iowa);

5. The denial to citizens so sued—under the terms of the Renegotiation Act—of their natural and constitutional right to interpose full and adequate defense in the districts where they reside or are sued, or where the property is situated;

6. The citizens' hands are tied by the exclusive jurisdiction given the Tax Court, *and the prohibition of review by any United States Court.*

Certainly such a grotesquely unjust situation never was contemplated by the framers of the Constitution, and of the amendments constituting the Bill of Rights. Petitioners are not asking a jury trial—as provided in the Seventh Amendment for common law suits involving amounts exceeding $20, and as provided by the Judicial Code of the United States, 28 U. S. C. 1872, as to all original actions at law in the Supreme Court against citizens.

But petitioners do seek relief in this Court from arbitrary and erroneous administrative procedure, alien to the American sense of justice in that it *provides no adequate appeal to the constitutional United States courts.*

Carried to its logical conclusion, the decision of the Court of Appeals in effect gives *carte blanche* to administrative agencies to disregard restrictive provisions of laws

enacted by Congress—and to take arbitrary and unauthorized action to enforce the claims of the government against citizens.

Furthermore, the lower Court's decision *recognizes no restraint upon the power of Congress* to shut citizens off from appeal to United States Courts from orders of administrative agencies, no matter how arbitrary such orders may be.

POINT II

The lower Court's decision was invalid because it was rendered by a division lacking legal authority.

Two weeks before the lower Court's decision was rendered "Per Curiam" one member of the 3-Judge division had died (Judge Proctor). The original opinion did not bear the name or initials of any Judge. The original of the judgment bears the initials only of the presiding Judge of the division.

There are no official minutes of the Court showing *who* prepared the opinion, *when* it was prepared, and *when* it was approved or concurred in by members of the division. But appended to the "Per Curiam" opinion is the statement: "Circuit Judge Proctor concurred in this opinion but died before it was filed."

Question is raised here—as it was on a petition for rehearing by the Court of Appeals *in banc* (R. 71), which was denied (R. 89)—*whether the two surviving members of the division constituted a legal panel for the decision of cases.*

As to what constitutes a division of a Court of Appeals, *Sec. 46 (b) of 28 U. S. C. A.* provides: (*infra*, p. 27)

> "In each Circuit the Court may authorize the hearing and determination of cases and controversies by separate divisions, each consisting of three Judges."

It is true that subsection (d) of the same section provides that: "A majority of the number of Judges authorized to

constitute a Court or division thereof, as provided in paragraph (c), shall constitute a quorum."

But a fair and reasonable construction of the language used supports the view that the quorum provision of (d) was intended to apply in cases of *temporary* absence of one of the Judges of a division or several Judges of a Court *in banc*.

The question is presented whether a division, in the light of subsection (b) can consist of only *two* Judges, the third original member having died two weeks before a case was officially decided.

In general,

> "A judgment is not complete, perfect, and effective until it has been duly entered. * * * A judgment is not final, in the sense that it cannot be withdrawn or changed by the Court until it has been entered." 49 C. J. S. 230-231, ¶107 and cases cited; In re Forstner Chain Corp., 177 F. (2) 572, 576-7; U. S. v. Rayburn, 91 F. (2) 162, 164.

It has been held that in case of the death of a judge before rendering judgment, his successor cannot render a valid judgment without a trial *de novo*. (48 C. J. S. 1019, and cases cited in footnotes 58-60).

> *McAllen* v. *Souza*, 74 P. (2) 853, 856.
> *Hawley* v. *Priest*, 19 P. (2) 400, 401.
> *State* v. *Kay*, 4 P. (2) 498, 500.

The rule is that "An existing judicial office without an incumbent is vacant." (33 C. J. 947, Sec. 53)

Likewise,

> "Where a vacancy occurs in the office, no other judge can sit in his district, and all judicial action remains in abeyance until the vacancy is filled, or another judge (is) designated pursuant to law to exercise the judicial functions temporarily. * * * Ordinarily a vacancy may be created by * * * the death or resignation of the incumbent." (*Ibid*, Sec. 55, and cases cited, footnote 52).

It is respectfully submitted that a litigant is entitled to the benefit of the possible consideration of a case by a 3-Judge division *up to the day it is actually officially decided.*

The unit of the Court division is destroyed by death. The lack of a third living Judge impairs at least one of the possibilities of full discussion and possible reconsideration within the division *after an opinion is prepared and before the decision is actually rendered.* (See *Ayrshire Collieries Corp* v. *U. S.*, 331 U. S. 132)

The circumstances of this case strongly indicate that some judicial doubts existed about the decision. The case was argued more than five months before it was decided—and then officially and publicly decided *two weeks after one of the Judges had died. No explanation is given of the delay.*

In the case of *Ayrshire Collieries Corp.* v. *U. S., supra,* this Court, in upholding the necessity for participation in the determination of a case by *all* members of a specially constituted three-Judge Court, stated: (l.c. 139)

> "The Act provides, it is true, that a decision may be reached by a three-Judge Court if a 'majority of said three Judges concur.' But that means only that the decision of the three Judges need not be unanimous; it does not imply that two Judges alone may hear and determine the case."

In a footnote (l.c. 137) the Court pointed out that its decision in *Ohio* v. *U. S., infra,* affirming a decision by a 3-Judge Court, one of the members of which died, should not be regarded as a precedent on the jurisdictional issue.

Petitioners believe that the *unusual circumstances* surrounding the rendition of the decision in this case raise a substantial question as to the legal authority and power of an "abbreviated division" of the Court of Appeals to render judgment two weeks after one of the members has died—*in the entire absence of any opinion or memorandum prepared, or signed, or initialed by the latter.*

In two other cases where decisions were rendered by federal Courts after the death of Judges, it appears that *opinions had been prepared* by the members of the Court who died before filing of the decisions. And no issue was raised in this Court on the point involved in the present case, the circumstances not being the same:

Potter Title Co. v. *Ohio Barge Line, Inc.*, 184 F. 2d 432; cert. denied, 340 U. S. 955.
State of Ohio v. *U. S.*, 6 F. Supp. 386, affirmed, 292 U. S. 498.

* * *

Considering the case as a whole, there is apparent a substantial lack of that due process of law which the Constitution requires in the taking of a citizen's property.

CONCLUSION

For the above reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted in this case.

Oscar H. Brinkman,
Wendell H. Cloud,
Charles E. Swanson,
Counsel for Petitioners.

APPENDIX

Constitutional and Statutory Provisions Involved.

(A) *Constitution.*

Art. III, Sections 1 and 2, provide in pertinent part:

> SECTION 1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the Supreme and inferior Courts, shall hold their offices during good behavior * * *.
>
> SECTION 2. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties * * *; to controversies to which the United States shall be a party * * *.

The Fifth Amendment provides in pertinent part:

> Nor shall any person * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

(B) *Statutes.*

Pertinent parts of the Renegotiation Act of 1943, as amended, provide as follows:

> "Section 403(d). (1) There is hereby created a War Contract Price Adjustment Board (in this section called the 'Board') which shall consist of six members * * *"
>
> "(5) * * * The Board may review any determination by any such officer, agency, or division on its own motion * * *. * * * Upon any review by the Board, the Board may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the officer, agency, or division whose action is so reviewed. * * *"
>
> "Section 403(c). (1) Whenever, in the opinion of the Board, the amounts received or accrued under contracts with the Departments and subcontracts may reflect excessive profits, the Board shall give to the contractor or subcontractor, as the case may be, reason-

able notice of the time and place of a conference to be held with respect thereto. The mailing of such notice by registered mail to the contractor or subcontractor shall constitute the commencement of the renegotiation proceeding. * * *

"If the Board does not make an agreement with respect to the elimination of excessive profits received or accrued, it shall issue and enter an order determining the amount, if any, of such excessive profits * * * The Board shall exercise its powers with respect to the aggregate of the amounts received or accrued during the fiscal year (or such other period as may be fixed by mutual agreement) by a contractor or subcontractor under contracts with the Department and subcontracts, and not separately with respect to amounts received or accrued under separate contracts * * *.

"(2) * * * Actions on behalf of the United States may be brought in the appropriate courts of the United States to recover from the contractor any amount of such excessive profits actually paid to him and not withheld or eliminated by some other method under this subsection." * * *

"(6) This subsection shall be applicable to all contracts and subcontracts, to the extent of amounts received or accrued thereunder in any fiscal year ending after June 30, 1943, whether such contracts or subcontracts were made on, prior to, or after the date of the enactment of the Revenue Act of 1943, * * *."

"Section 403(e). (1) Any contractor or subcontractor aggrieved by an order of the Board determining the amount of excessive profits received or accrued by such contractor or subcontractor may, within 90 days * * * file a petition with the Tax Court of the United States for a redetermination thereof. Upon such filing such Court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency. The Court may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the Board. A proceeding before the Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceed-

ing to review the determination of the Board, but shall be treated as a proceeding de novo. * * *

"(2) Any contractor or subcontractor * * * aggrieved by a determination of the Secretary made prior to the date of the enactment of the Revenue Act of 1943, with respect to a fiscal year ending before July 1, 1943, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within 90 days * * * after the date of the enactment of the Revenue Act of 1943, file a petition with the Tax Court of the United States for a redetermination thereof, and any such contractor or subcontractor aggrieved by a determination of the Secretary made on or after the date of the enactment of the Revenue Act of 1943, with respect to any such fiscal year, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within 90 days * * * file a petition with the Tax Court of the United States for redetermination thereof. Upon such filing such Court shall have the same jurisdiction, power, and duty, and the proceeding shall be subject to the same provisions, as in the case of a petition filed with the Court under paragraph (1), except that the amendments made to this section by the Revenue Act of 1943, which are not made applicable as of April 28, 1942, or to fiscal years ending before July 1, 1943, shall not apply."

Sec. 701 (d), Revenue Act of 1943, supra:

"The amendments made by subsection (b) shall be effective, only with respect to the fiscal years ending after June 30, 1943, except that (1) the amendments inserting subsections (a) (4) (C), (a) (4) (D), (i) (1) (D), (i) (1) (F), (i) (3), and (1) in section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, shall be effective as if such amendments and subsections had been a part of section 403 of such Act on the date of its enactment, and (2) the amendments adding subsection (d) and (e) (2) to section 403 of such Act shall be effective from the date of the enactment of this Act."

Pertinent parts of 26 U.S.C. 1141 and 1142 are as follows:

Sec. 1141(a). The Courts of Appeals shall have exclusive jurisdiction to review the decisions of the Tax

Court, except as provided in Section 1254 of Title 28 of the U.S. Code, in the same manner and to the same extent as decisions of the District Courts in civil actions tried without a jury; and the judgment of any such Court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in Section 1254 of Title 28 of the United States Code.

Sec. 1141(b)(1). Except as provided in paragraph 2, such decisions may be reviewed by the Circuit Court of Appeals for the circuit in which is located the Collector's office to which was made the return of the tax in respect of which the liability arises, or, if no return was made, then by the United States Court of Appeals for the District of Columbia.

Sec. 1142. The decision of the Tax Court rendered after February 26, 1926 * * * may be reviewed by a Circuit Court of Appeals or the United States Court of Appeals for the District of Columbia, as provided in Section 1141, if a petition for such review is filed by either the Commissioner or the taxpayer within three months after the decision is rendered * * *.

Title 28, U.S. Code, Section 46, provides as follows:

(a) Circuit judges shall sit on the court and its divisions in such order and at such times as the court directs.

(b) In each circuit the court may authorize the hearing and determination of cases and controversies by separate divisions, each consisting of three judges. Such divisions shall sit at the times and places and hear the cases and controversies assigned as the court directs.

(c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges of the circuit.

(d) A majority of the number of judges authorized to constitute a court or division thereof, as provided in paragraph (c), shall constitute a quorum.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 538

THEODORE W. KELLER AND DOROTHY L. KELLER, CO-PARTNERS TRADING UNDER THE NAME OF HOWARD MANUFACTURING COMPANY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (R. 46-56) is not reported. The *per curiam* opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 68) is reported at 207 F. 2d 610.

JURISDICTION

The judgment of the Court of Appeals was entered on October 1, 1953 (R. 69). A timely petition

for rehearing in banc was denied on December 1, 1953 (R. 89). The petition for a writ of certiorari was filed on January 16, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. If Section 403(e) of the 1942 Renegotiation Act (as amended) be construed to accord finality to rulings by the Tax Court on question of law and fact, not involving jurisdictional or constitutional issues, arising in the course of the Tax Court's redetermination of the amount of excessive profits—

(a) Did the Court of Appeals err in ruling that the particular issue presented by petitioners for review was not jurisdictional?

(b) Assuming that the issue presented for review was not jurisdictional, does the according of such finality to a determination of the Tax Court violate the due process clause of the Fifth Amendment?

2. Whether the death of Judge Proctor after he had concurred in the unanimous opinion of the court below but before the opinion was filed invalidates the judgment.

STATUTES INVOLVED

1. Section 403(e) of the Renegotiation Act (Sixth Supplemental National Defense Appropriation Act, 1942, 56 Stat. 226, 245) as amended by the Revenue Act of 1943 (Act of February 25, 1944, c. 63, Title VII, 58 Stat. 21, 78, 86) (50 U.S.C. App. 1191(e)) provides, in pertinent part, as follows:

> Any contractor or subcontractor aggrieved by an order * * * determining the amount

of excessive profits received or accrued by such contractor or subcontractor may * * * file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency. * * *.

2. 28 U.S.C. 46 provides, in pertinent part, as follows:

* * * * *

(b) In each circuit the court may authorize the hearing and determination of cases and controversies by separate divisions, each consisting of three judges. Such divisions shall sit at the times and places and hear the cases and controversies assigned as the court directs.

(c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges of the circuit.

(d) A majority of the number of judges authorized to constitute a court or division thereof, as provided in paragraph (c), shall constitute a quorum.

STATEMENT

The War Contracts Price Adjustment Board had unilaterally determined petitioners' excessive profits for the fiscal year ended December 31, 1943, to be $1,270,000. Upon a petition for redetermination, the Tax Court redetermined that petitioners' excessive profits for that period amounted to $1,100,000. On appeal, the Court of Appeals for the District of Columbia Circuit dismissed the petition for review for lack of jurisdiction. The pertinent facts are as follows:

On December 31, 1943, petitioners and the Undersecretary of War entered into a bilateral agreement eliminating as excessive $60,000 of the profits realized by petitioners during the fiscal year ended December 31, 1942 (R. 35-38). The excessive profits thus eliminated were computed on a cash basis, the same accounting basis used by petitioners in filing their tax returns for the 1942 and 1943 fiscal years (R. 47). In contemplation of a possible change in petitioners' accounting basis for tax purposes, the bilateral agreement expressly provided for reopening of renegotiation in the event that petitioners' method of accounting for tax returns was changed to an accrual basis (R. 36-37).

On July 12, 1944, the Bureau of Internal Revenue determined that petitioners must compute their income on the accrual basis of accounting (R. 32-35). Petitioners agreed to this change, and, as a result, petitioners' net income for 1942 was increased by $121,537.06 (R. 33, 34, 48).

Pursuant to the terms of the bilateral renegotia-

tion agreement, renegotiation was reopened for the 1942 fiscal year (R. 48). Petitioners took the position, however, that renegotiation should be determined on the cash rather than the accrual basis. On the cash basis, this additional income was attributable to the 1943 fiscal year. On the other hand, if renegotiation was determined on the same basis as that used for tax purposes, this additional income was allocable to 1942 (R. 53).

Agreement was not reached, and on May 10, 1945, the War Department Price Adjustment Board, acting on behalf of the Secretary of War, issued a unilateral order eliminating, on an accrual basis, $180,000 as excessive profits for 1942—$120,000 in addition to the $60,000 eliminated under the bilateral agreement (R. 38-41, 48). On the same day, the War Department Price Adjustment Board, acting on behalf of the War Contracts Price Adjustment Board, unilaterally determined that petitioners' excessive profits for the fiscal year ended December 31, 1943, were $1,150,000 (R. 22-24). Since it might ultimately be held that petitioners' excessive profits were renegotiable on the cash rather than accrual basis, and, accordingly, that the $120,000 (added for 1942) was attributable to 1943 rather than 1942, an additional $120,000 was added to the determination for 1943 to preclude the possibility that petitioners might escape renegotiation of that sum (R. 23, 53). In particular, the order for the 1943 fiscal year provided for the elimination of two separate items as excessive profits, one for $1,150,000 and the second for $120,000. With respect

to the second item, the order further provided that "no part of such sum of $120,000 shall be eliminated hereunder which is or shall be repaid by cash, tax credit, or otherwise pursuant to the determination dated 10 May 1945 * * * with respect to the fiscal year of the Contractor ended 31 December 1942" (R. 23). On August 25, 1945, the War Contracts Price Adjustment Board ratified the unilateral determination for 1943 (R. 20-21).[1]

Thereafter, the instant proceeding was brought in the Tax Court for redetermination of the unilateral determination of the War Contracts Price Adjustment Board for the 1943 fiscal year (R. 13-18). No Tax Court review was sought for the unilateral order of the War Department Price Adjustment Board for the 1942 fiscal year (R. 65-66). In their petition, petitioners asked the Tax Court to hold that the Renegotiation Act was unconstitutional and that the Tax Court lacked jurisdiction to review the order appealed from because it undertook to eliminate or collect excessive profits for 1942 and was, therefore, void since the War Contracts Board had no jurisdiction over fiscal years ending before July 1, 1943 (R. 15-16, 17-18, 58-59). See footnote 1, *supra*, p. 6.

During the course of the hearings in the Tax

[1] The War Contracts Price Adjustment Board was created by Section 701(b) of the Revenue Act of 1943 (Act of February 25, 1944, c. 63, Title VII, 58 Stat. 21, 78), which amended the 1942 Renegotiation Act (Sixth Supplemental National Defense Appropriations Act, 1942, 56 Stat. 226, 245). As amended, renegotiation authority of the Secretary of War was limited to fiscal years ending before July 1, 1943, and renegotiation authority for subsequent fiscal years was vested in the War Contracts Price Adjustment Board.

Court, petitioners abandoned the constitutional issues raised in their petition (R. 62). Although contending that the War Contracts Price Adjustment Board had exceeded its jurisdiction, petitioners still had not at that time taken a definite position as to whether the $120,000 in issue was allocable to 1942 or to 1943 (R. 65-66).

The Tax Court rejected petitioners' argument that the order for the 1943 fiscal year was void, and concluded, on the evidence before it, that petitioners' excessive profits for 1943 were $1,100,000 (R. 46, 57). The Tax Court stated that (R. 50-51):

> The order shows on the face thereof that the fiscal year 1943 was the subject thereof, that $1,150,000 in one item, and in addition thereto $120,000 in a second item was determined to be excessive and subject to elimination. So far, obviously, the order is not void for the statute does not require the amount determined to be excessive profits and eliminable to be stated in one item. The order then goes on to provide that the $120,000 should also be eliminated except, in substance, any part of that sum repaid by cash, tax credits or otherwise, pursuant to a determination with respect to the fiscal year 1942. In our view, there is in this order no determination of excessive profits for 1942. This is indicated by the reference to a separate determination under a separate order, for 1942. The reference to 1942 is merely explanatory of the reason why this order, for 1943, provides for a conditional diminution of the elimination as to the $120,000 item. * * *

> Though such limitation on elimination "relates to profits accrued in the calendar year 1942," as petitioners urge, that does not mean that there is renegotiation or determination of excessive profits for the year 1942 or that an order or directive was made to eliminate or collect excessive profits for 1942. It was one "regarding the elimination or collection of excessive profits" for 1942 only in the sense that reference was made to the fact of possible repayment pursuant to the order for 1942, as the cause or justification for cutting down the amount of elimination for 1943. Neither the statute nor logic forbids such reference.

Continuing, the Tax Court pointed out that, far from providing for renegotiation or collection of excessive profits for 1942, the separation of the total determination of $1,270,000 into two separate items and the provision for *pro tanto* diminution of the second item of $120,000 were designed solely to protect petitioners against the possibility of double elimination of any part of the $120,000 from profits. To protect the Government's interest with respect to the question of cash or accrual accounting, "the Board might merely have made a determination that the excessive profit for 1943 was $1,270,000 despite the fact that another order, for 1942, had been entered for $120,000, which amount, if in fact petitioners were upon the accrual basis for both years, would be duplication" (R. 53). Instead of so doing, the Board expressly provided against duplication of elimination of the

item. "This, in our view, is the opposite of entrapment and the order does not fail clearly to advise the petitioners of the determination and is not ambiguous, doubtful or uncertain." (R. 53) [2]

After the Tax Court denied a motion for reconsideration (R. 58, 60), petitioners filed a petition for review in the court below. Argument was heard before Circuit Judges Edgerton, Clark and Proctor. Two weeks after the death of Judge Proctor, the court below filed a *per curiam* opinion dismissing the appeal for lack of jurisdiction on the authority of its earlier decision in *Psaty & Fuhrman, Inc.* v. *Stimson*, 182 F. 2d 985 (R. 68). [3] Appended

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[2] The Tax Court further held that, even if the paragraph of the Board's order relating to the $120,000 was void, it was wholly separable and the rest of the order was not thereby rendered void (R. 54, 55).

[3] In full, the opinion of the court below in *Psaty & Fuhrman, Inc.* v. *Stimson, supra*, states as follows:

> Petitioner, on March 16, 1942, entered into a contract with the Government for the construction of a hospital. The Secretary of War renegotiated the contract on a completed contract basis and, on February 7, 1944, made a unilateral determination that petitioner had excessive profits of $700,000. Petitioner applied to the Tax Court for a determination that the renegotiation of its contract must be upon a fiscal (which in this case was calendar) year basis. The Tax Court supported the Secretary.
>
> It is now settled that a question such as the one here before us, being neither constitutional nor jurisdictional, is one which the Tax Court under the statute, 50 U.S.C.A. Appendix § 1191, has exclusive and final jurisdiction to determine.[1] The petition must, therefore, be
>
> Dismissed.
>
> [1] Lichter v. United States, 1948, 334 U.S. 742, 68 S.C. 1294, 92 L. Ed. 1694; Aircraft & Diesel Equipment Corp. v. Hirsch, 1947, 331 U.S. 752, 67 S. Ct. 1493, 91 L. Ed. 1796; Macauley v. Waterman S.S. Corp., 1946, 327 U.S 540, 66 S. Ct. 712, 90 L. Ed. 839; Ring Const. Corporation v. Secretary of War of U.S., 1949, 85 U.S. App. D.C. 386,

at the bottom of the opinion was the notation that "Circuit Judge Proctor concurred in this opinion but died before it was filed." (R. 68). Subsequently, the court below denied a petition for rehearing in banc, which presented the identical issues raised here by petitioners (R. 71-89).

ARGUMENT

1. From the inception of litigation seeking appellate review of Tax Court redeterminations under the Renegotiation Acts, the court below has held that its appellate jurisdiction is limited to the review of constitutional and jurisdictional questions, and that Section 403(e) of the Act (*supra*, p. 2) "places exclusive and unreviewable jurisdiction in the Tax Court to determine the amount of excessive profits, including questions of both law and fact in such determination." *U. S. Electrical Motors* v. *Jones*, 153 F. 2d 134, 136 (C.A. D.C.); *Blanchard Machine Co.* v. *R.F.C.*, 177 F. 2d 727 (C.A. D.C.), certiorari denied, 339 U.S. 912; *Ring Construction Co.* v. *Secretary of War*, 178 F. 2d 714 (C.A. D.C.), certiorari denied, 339 U.S. 943; *Eastern Machinery Co.* v. *Under Secretary of War*, 182 F. 2d 99 (C.A. D.C.); *Psaty & Fuhrman, Inc.* v. *Stimson*, 182 F. 2d 985 (C.A. D.C.); *Lowell Wool By-Products Co.* v. *War Contracts Price Adjustment Board*, 192 F.

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178 F. 2d 714, certiorari denied, 1950, 339 U.S. 943, 70 S. Ct. 796; Eastern Machinery Company v. Under Secretary of War, 1950, 86 U.S. App. D.C. —, 182 F. 2d 99; Blanchard Mach. Co. v. Reconstruction Finance Corp., 1949, 85 U.S. App. D.C. 361, 177 F. 2d 727, certiorari denied, 1950, 339 U.S. 912, 70 S. Ct. 571; U.S. Electrical Motors v. Jones, 1946, 80 U.S. App. D.C. 329, 153 F. 2d 134.

2d 405 (C.A. D.C.); *Armstrong* v. *War Contracts Price Adjustment Board*, 194 F. 2d 875 (C.A. D.C.), certiorari denied, 343 U.S. 967; *Knu-Vise, Inc.* v. *War Contracts Price Adjustment Board*, 195 F. 2d 198 (C.A. D.C.). Contending that their appeal below was improperly dismissed, petitioners here argue, in the alternative, that the issue they raise is jurisdictional and that, in any event, Section 403(e) is unconstitutional insofar as it limits review of Tax Court redeterminations. Both contentions are without merit.

(a). Petitioners' assertion that the Tax Court lacked jurisdiction to redetermine the War Contracts Price Adjustment Board's determination of excessive profits is grounded upon the claim that the Board's order for the 1943 fiscal year was void because it included a determination of $120,000 as excessive profits for the 1942 fiscal year.[4] As shown in the Statement, *supra*, pp. 4-9, this argument has no foundation in fact.

The bilateral agreement fixed, on the cash basis of accounting, $60,000 as excessive profits for the 1942 fiscal year and provided for the reopening of renegotiation should petitioners' method of accounting be changed. When, at the insistence of the Bureau of Internal Revenue, petitioners' accounting method for tax purposes was changed, in July 1944, to an accrual basis, thereby increasing their income for the 1942 fiscal year by some $120,-

[4] As noted above, p. 6, fn. 1, Section 701 of the Revenue Act of 1943, *supra*, authorized the War Contracts Price Adjustment Board to determine excessive profits only with respect to fiscal years ending after June 30, 1943.

000, the Secretary undertook to reopen the 1942 renegotiation, as contemplated by the bilateral agreement. Petitioners took the position, however, that renegotiation should continue to be determined on the cash basis, which would put the $120,000 into the 1943 fiscal year, rather than on the accrual basis, which would cast it into 1942. Upon the failure to reach agreement, the Secretary and the War Contracts Price Adjustment Board each issued a unilateral order determining the $120,000 to be excessive profits; the Secretary's order related to the 1942 fiscal year, as to which the Secretary had jurisdiction, eliminating the $120,000 on an accrual basis, while the War Contracts Price Adjustment Board's order dealt with the 1943 fiscal year, as to which the Board had jurisdiction, eliminating it on a cash basis. Since the purpose of the dual orders was to preclude the possibility that petitioners might escape renegotiation of the $120,000 and not to eliminate the $120,000 twice, the Board's order expressly provided that "no part of such sum of $120,000 shall be eliminated hereunder which is or shall be repaid by cash, tax credit, or otherwise pursuant to the determination dated 10 May 1945 * * * with respect to the fiscal year * * * ended 31 December 1942" (R. 23).

Both on its face and viewed in context, the Board's order purports only to make a necessary accounting adjustment to renegotiate excessive profits for 1943. As the Tax Court observed in regard to the 1943 order before it, "there is in this

order no determination of excessive profits for 1942. This is indicated by the reference to a separate determination under a separate order, for 1942." (R. 51). Further, far from providing for renegotiation or collection of excessive profits for 1942, the separation of the $1,270,000 into two separate items and the provision for *pro tanto* diminution of the second item of $120,000 was designed solely for petitioners' protection.

As the Tax Court pointed out, to protect the Government's interests with respect to the cash or accrual basis question, "the Board might merely have made a determination that the excessive profit for 1943 was $1,270,000 despite the fact that another order, for 1942, had been entered for $120,000, which amount, if in fact petitioners were upon the accrual basis for both years, would be duplication. Instead of so doing, the Board though making, in our view, a determination of $1,270,000, in two items, for 1943, then expressly provided against duplication of elimination, by the paragraph complained of" (R. 53).

In short, the Board's order for 1943 here involved does not determine the $120,000 to be excessive profits for 1942 but simply makes a necessary accounting adjustment for the possibility that the $120,000 might ultimately be allocable to 1943 rather than 1942, and carefully protects petitioners against the possibility of double elimination of any part of the $120,000 as excessive profits. In the circumstances, both the Tax Court and the court be-

low correctly concluded that no jurisdictional question was presented.[5]

(b). Petitioners' argument that Section 403(e) fails to provide "adequate and effective appeal" to the courts from the Tax Court's redeterminations of excessive profits and so violates the due-process clause of the Fifth Amendment (Pet. p. 8) is substantially the same as that advanced in *Ring Construction Corp.* v. *Secretary of War,* No. 656, October Term, 1949, certiorari denied, 339 U.S. 943. In our view, the same reasons which warranted the denial of certiorari in that case are equally applicable here.[6]

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[5] *National Builders, Inc.* v. *Secretary of War,* 16 T.C. 1220 (cited at Pet. p. 16) does not conflict with the characterization of the instant question as non-jurisdictional. There, the Secretary of War, after the enactment of the amendments to Section 403 of the Renegotiation Act by Section 701 of the 1943 Revenue Act—which limited the Secretary's renegotiation authority to fiscal years ending before July 1, 1943, and vested authority for subsequent fiscal years in the War Contracts Price Adjustment Board—made a unilateral determination on a completed contract basis which included profits realized after July 1, 1943. Since the Secretary had not made any determination for the fiscal year ending July 1, 1943, and since Section 403(e)(2) of the Renegotiation Act authorizes review *vis a vis* the Secretary only of determinations with respect to a fiscal year ending before July 1, 1943, the Tax Court dismissed the proceedings for lack of jurisdiction. Here, there is no question that the War Contracts Price Adjustment Board had jurisdiction to make a determination for petitioners' 1943 fiscal year, and that the elimination of $1,150,000 was for 1943. The only issue was whether the additional $120,000 in the 1943 order was an elimination for 1943, as an accounting adjustment, or an elimination for 1942.

Maguire Industries v. *Secretary of War,* 12 T.C. 75, upon which petitioners also rely (Pet. p. 16), was reversed on appeal. 185 F. 2d 434 (C.A. D.C.).

[6] The Court may deem it of interest to be apprised of the state of appellate litigation in this field. To date, some 900 petitions for review under the 1942 Renegotiation Act have

Moreover, petitioners' claim is without merit, for it is plain that Congressional denial of appellate scrutiny of alleged errors of the Tax Court which do not relate to jurisdictional or constitutional matters does not constitute a violation of due process. Cf. *Spaulding* v. *Douglas Aircraft Co.*, 154 F. 2d 419, 427 (C.A. 9); *Stein Bros. Mfg. Co.* v. *Secretary of War*, 7 T.C. 863, 882-883. "To learn what the procedure must be in a particular situation, in order to constitute due process, we turn necessarily to the decisions of our Court. These tell us that due process does not require that a decision made by an appropriate tribunal shall be reviewable by another. *Pittsburgh, C., C. & St. L. Ry.* v. *Backus*, 154 U.S. 421, 426-427; *Reetz* v. *Michigan*, 188 U.S. 505, 508; *Dohany* v. *Rogers*, 281 U.S. 362, 369. They tell us that due process is not necessarily judicial process. *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 280; *McMillen* v. *Anderson*, 95 U.S. 37, 41; *United States* v. *Ju Toy*, 198 U.S. 253, 263. * * *" *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 76-77 (Brandeis, J., concurring). This Court has upheld provisions precluding review of questions comparable to those raised by petitioners in a number of cases. See, as examples, *Crane* v. *Hahlo*, 258 U.S. 142; *Hilton* v. *Merritt*, 110 U.S. 97; *Passavant* v. *United States*, 148 U.S. 214; *United States* v. *Ju Toy*, 198 U.S. 253; *Oceanic Navigation Co.* v. *Stran-*

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been filed in the Tax Court. Of those 900 odd cases, some 115 cases still remain on the docket of the Tax Court. Of the approximately 800 cases disposed of by the Tax Court, only some twenty cases were appealed to the courts of appeals.

ahan, 214 U.S. 320; cf. *Williamsport Co.* v. *United States*, 277 U.S. 551; *Heiner* v. *Diamond Alkali Co.*, 288 U.S. 502; see, also, *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297, 303-304; *Estep* v. *United States*, 327 U.S. 114, 120, 122-123; *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 76-82 (Brandeis, J., concurring). The validity of the finality provision is even stronger here since the agency issuing the allegedly erroneous order is the Tax Court which has "essentially judicial procedures and experience." *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U.S. 752, 769; *Dobson* v. *Commissioner*, 320 U.S. 489, 498-499. See also *French* v. *War Contracts Price Adjustment Board*, 182 F. 2d 560 (C.A. 9); *Warner* v. *War Contracts Price Adjustment Board*, 188 F. 2d 363 (C.A. 9) (holding that the finality clause also precludes review of jurisdictional and constitutional issues by the courts of appeals).[7]

2. Petitioners' final contention is that the decision below is invalid because of the death of Circuit Judge Proctor after he had concurred in the unanimous opinion of the court but before the opin-

[7] Although the court below and the Ninth Circuit are in conflict as to the scope of the finality clause, the questions here raised by petitioners are not within the area of that conflict. The issue on which the conflict exists is whether the finality clause validly withholds appellate review of jurisdictional and constitutional matters. That question is not presented here. The issue here is whether the exclusion of appellate review of non-jurisdictional and non-constitutional questions is valid; as to this issue, no conflict exists and the courts of appeals are in accord. Should certiorari be granted, however, we reserve the right to urge that the judgment below should be affirmed on the ground that the courts of appeals are without jurisdiction to review Tax Court renegotiation orders on any issue.

ion was filed. This assertion flies in the face of the unequivocal language of 28 U.S.C. 46, which provides for divisions of three judges (28 U.S.C. 46(b) and (c) *supra*, p. 3) and declares that "a majority of the number of judges authorized to constitute a court or division thereof, as provided in paragraph (c), shall constitute a quorum." (28 U.S.C. 46(d) *supra*, p. 3). In holding in *Ayrshire Corp.* v. *United States*, 331 U.S. 132, that a decision by only two judges of a specially constituted three-judge court under the Urgent Deficiencies Act did not meet the statutory requirements that three judges "hear and determine" the suit, this Court significantly observed that the Urgent Deficiencies Act "makes no provision for a quorum of less than three judges. Two judges of a three-judge circuit court of appeals, on the other hand, ordinarily constitute a statutory quorum for the hearing and determination of cases" (331 U.S. at 138). The action taken by the two surviving judges below is fully in accord with this observation and with the result reached by other courts in which the problem has arisen. Cf. *Potter Title & Trust Co.* v. *Ohio Barge Line, Inc.*, 184 F. 2d 432 (C.A. 3), certiorari denied, 340 U.S. 955; *Ohio* v. *United States*, 6 F. Supp. 386 (S.D. Ohio), affirmed, 292 U.S. 498.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY, 1954.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1954 [illegible]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 538

THEODORE W. KELLER and DOROTHY L. KELLER, co-partners trading under the name of Howard Manufacturing Company, *Petitioners*,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

REPLY OF PETITIONERS TO BRIEF FOR THE UNITED STATES IN OPPOSITION.

The petitioners herein respectfully submit this reply brief to correct some of the erroneous and misleading statements contained in the government's brief in opposition to the petition for certiorari.

However, the petitioners are indebted to the Solicitor General's office for making clear in the last sentence of footnote 7 (p. 16, government's brief) *that the government in-*

tends to prevent any and all judicial review of Tax Court renegotiation orders.

The naked purpose of government counsel is revealed in these words (*supra*):

> "Should certiorari be granted, however, we reserve the right to urge that the judgment below should be affirmed on the ground that the courts of appeals are without jurisdiction to review Tax Court renegotiation orders *on any issue.*" (Emphasis supplied)

If the government succeeds in this undertaking, then the road will be cleared, by "precedent," to deny access to the United States Courts to citizens whose property or other rights have been violated by administrative tribunals (including the Tax Court), even though they may have exceeded their jurisdiction as in this case, or adopted procedures in conflict with the provisions of the Constitution of the United States.

Stated another way, the government seeks this Court's stamp of approval on a provision of "emergency legislation" that cuts citizens off from *any* judicial review of important decisions of an administrative agency.

Petitioners respectfully reiterate, therefore, that the questions involved are of sufficient importance to justify the granting of the writ so that the fundamental issues may be adequately presented in briefs and oral argument.

In footnote 6 (p. 15, government's brief) it is stated that 115 cases under the 1942 Renegotiation Act remain on the docket of the Tax Court. For the guidance of that agency, and of the lower federal courts, in disposing of cases under the 1942 Act and subsequent *similar* enactments relating to renegotiation, a definite decision by this Court would be of benefit.

* * * * *

1. Moving now to the body of the government's brief in opposition, petitioners call attention to the confused and

contradictory character of the defense of the War Contracts Price Adjustment Board's order ostensibly determining excessive profits only for 1943 but in reality illegally including a collection order for 1942 profits.

In *footnotes* (pp. 6 and 11) the government is obliged to admit that the Board had no authority over 1942 profits.

But, on pages 5, 8, 9, 11, 12, and 13, the government seeks to clothe the so-called 1943 order with legality by asserting in *contradictory* statements:

> (a) The disputed part of the order was "designed solely to protect petitioners against the possibility of double elimination of * * * profits." (p. 8 and 13)
>
> (b) "The purpose of the dual orders was to preclude the possibility that petitioners might escape renegotiation" of part of 1942 profits by reason of a change in accounting from a cash to an accrual basis. (p. 5, 12 and 13).
>
> (c) The Board desired to "protect" the petitioners against "duplication" of levy upon their profits, so it issued an order finding an "additional" $120,000 of excess profits for 1943 although the same $120,000 had been designated as excessive profits for 1942 by an order of the Secretary of War. (p. 13)
>
> (d) The Board's order for 1943—issued May 10, *1945*—"simply makes a necessary accounting adjustment for the possibility that the $120,000 might ultimately be allocable to 1943 rather than 1942." (p. 13)

The absurdity and hollowness of this latter contention is demonstrated by a glance at the last paragraph on page 4 of the government's own brief and its statement of facts showing that the alleged accounting question had been *settled* many months before:

> "On July 12, *1944*, the Bureau of Internal Revenue determined that petitioners must compute their income

on the accrual basis of accounting. (R. 32-35). *Petitioners agreed to this change,* and, as a result, petitioners' net income for 1942 was increased by $121,537.06 (R. 33, 34, 48)." (Emphasis supplied)

The record demonstrates, therefore, that there was no accounting question in dispute, or in existence even, that could possibly serve as a basis for the *duplicate* orders and *duplicate* excess profits levies upon the same $120,000 for 1942 and 1943.

The record shows that the government filed *two* suits, also, that included the same $120,000 item. The government was, in effect, attempting to extort from petitioners *all* of their so-called additional excessive profits for 1942, by one means or another, without any allowance for additional use of plant, capital, etc.

The simple fact is that the government tried to exert more "leverage" on the petitioners through the duplicate and illegal levy in the order issued ostensibly merely for 1943 profits.

2. Petitioners did *not* abandon the constitutional issues raised in their petition to the Tax Court, as stated on page 7 of the government's brief.

They merely waived *argument* in an administrative agency that had no authority to decide constitutional questions. But petitioners again raised the question of constitutionality in their brief to the Tax Court, following the hearing there.

3. Petitioners have raised an important jurisdictional issue and also a serious constitutional issue.

Careful examination of the whole array of cases which the government has cited as decisive of those issues against the petitioners fails to disclose any that preclude this court or the lower court from reviewing Tax Court decisions in renegotiation cases.

Indeed, the weight of authority is that the federal courts have a special obligation to review actions or decisions of administrative agencies in excess of their jurisdiction or in violation of Constitutional requirements, including that of due process of law.

The government, for instance, has misconstrued a leading case, *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272.

It has disregarded the *majority* decision of this court in another case, *St. Joseph Stock Yards* v. *U. S.*, 298 U.S. 38, wherein the right and duty of judicial review of administrative action were upheld. There the court said, among other expressions to the same effect:

> "To say that the findings of fact of legislative agencies may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and that constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously impair the security inherent in our judicial safeguards. * * * Under our system, there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority." (*Supra*, l.c. 52).

And Justice Brandeis' concurring opinion, cited but NOT quoted by the government in its brief (p. 15) states:

> "The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied, and whether the proceeding in which facts were adjudicated was conducted legally. To that extent, the person asserting a right, whatever its source, should be entitled to the independent judgment of a court on the ultimate question of constitutionality." (*Supra*, l.c. 84)

In the case of *Estep* v. *U. S.*, 327 U.S. 114, 119, where the issue was the finality to be accorded to a Draft Board decision, and the law provided no judicial appeal, this court held, in effect, that review was not barred.

The words of Justice Murphy in that case are fully applicable in the present case:

> "But the war power is not a blank check to be used in blind disregard of all the individual rights which we have struggled so long to recognize and preserve. It must be used with discretion and with a sense of proportionate values. * * * As long as courts are open and functioning, judicial review is not expendable.
>
> "All the mobilization and all of the war effort will have been in vain if, when all is finished, we discover that in the process we have destroyed the very freedoms for which we fought." (*Supra*, l.c. 132).

The government's position in the present case is that the courts of the United States have no right to review a usurpation of jurisdiction and authority and an unlawful exercise of power by an administrative agency.

The writ should be granted so that the issue may be determined upon a full presentation of the facts and the law.

Respectfully submitted,

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